

IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF CALIFORNIA

OCTAVIO HERNANDEZ SUAREZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

CIV. NO. S-06-2728 EJG  
and CR S-02-246 EJG  
ORDER DENYING RULE 60(B)  
MOTION FOR RELIEF FROM  
JUDGMENT

Petitioner, a federal prisoner proceeding pro se, has filed a motion pursuant to Federal Rule of Civil Procedure 60(b) to set aside the court's order denying his § 2255 motion to vacate, set aside or correct his sentence. For the reasons that follow, the motion is DENIED.

Background

Defendant was convicted May 12, 2004, of drug trafficking offenses and was sentenced July 30, 2004 to a term of 240 months imprisonment. His convictions and sentence were affirmed by the Ninth Circuit in a memorandum decision filed June 16, 2006. United States v. Suarez, 185 Fed. Appx. 597 (9<sup>th</sup> Cir. 2006). On

1 December 4, 2006, defendant filed a motion to vacate, set aside  
2 or correct his sentence, pursuant to 28 U.S.C. § 2255, and a  
3 supplement to that motion May 21, 2007. The motion raised claims  
4 of ineffective assistance of counsel and mis-classification of a  
5 prior conviction. It was denied in an order filed March 20,  
6 2008. A certificate of appealability was denied by the district  
7 court on May 23, 2008, and by the Ninth Circuit on April 9, 2009.  
8 Now, more than two years after judgment has been entered on the §  
9 2255 petition, defendant seeks to revisit the issues through a  
10 60(b) motion.

#### 11 Discussion

12 Defendant argues that the court's March 20, 2008 order  
13 denying his § 2255 petition failed to reach the merits of all the  
14 claims raised. Specifically, defendant contends that his  
15 petition alleged that counsel was ineffective for failing to  
16 advise him of the significance of a § 851 enhancement on the  
17 length of his sentence and his right to plead "straight up"  
18 without an agreement. Had defendant been aware that the  
19 enhancement would add ten years to his sentence he would not have  
20 gone to trial and would have pled guilty. Defendant states that  
21 he is utilizing Rule 60(b) to correct a defect in the original §  
22 2255 proceedings, not to mount an indirect attack on his criminal  
23 conviction.

24 In general, a motion filed under section 2255 of Title 28 of  
25 the United States Code provides the sole means for a person under  
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1 sentence of a federal court who claims the sentence was imposed  
2 in violation of federal law, or without jurisdiction, or in  
3 excess of the maximum sentence allowed by law, to seek relief  
4 from that conviction and sentence. Defendant has already  
5 utilized this method, without success. A second, or successive §  
6 2255 motion may only be brought if certified by an appellate  
7 court to meet certain stringent requirements, none of which are  
8 present here. See 28 U.S.C. §§ 2244, 2255.

9 By seeking relief under Federal Rule of Civil Procedure  
10 60(b), defendant hopes to avoid the mandates of a second motion  
11 under § 2255. However, the fact that federal habeas relief is  
12 made more difficult by the "second" or "successive" petition  
13 rule, does not mean an alternate route to the same goal is  
14 available by reliance on a different procedural vehicle, namely  
15 civil rule of procedure 60(b). In fact, the federal rules of  
16 **civil** procedure may be used in the context of habeas proceedings  
17 only to the extent they are not inconsistent with the statutory  
18 provisions and rules already governing those proceedings. See  
19 Fed. R. Civ. P. 81(a)(2).

20 The Supreme Court has spelled out the distinction between a  
21 successive habeas petition and a Rule 60(b) motion, and states  
22 that the title appended to the motion is not determinative. See  
23 Gonzalez v. Crosby, 125 S.Ct. 2641 (2005). A motion, even though  
24 labeled as one under Rule 60(b), will be treated as a second or  
25 successive habeas petition, and thus subject to the rules

1 affecting successive petitions, if it raises a "claim" as that  
2 term is defined in 28 U.S.C. § 2244. "[A] 'claim' is an asserted  
3 federal basis for relief from a . . . judgment of conviction."  
4 Gonzalez, 125 S.Ct. at 2647.<sup>1</sup> If the motion attacks the  
5 validity of the criminal conviction or sentence, it is a  
6 collateral attack under § 2255, no matter what its label.  
7 However, if the motion attacks the integrity of the habeas  
8 *proceedings*, for example challenging the court's failure to reach  
9 the merits of the habeas petition, the motion may properly be  
10 considered to arise under Rule 60(b). Gonzalez, 125 S.Ct. at  
11 2651.

12 Here, defendant argues that he is not asking the court to  
13 address a new claim, rather he is asking it to address one  
14 previously raised but overlooked. However, a review of the § 2255  
15 petition, its supplement and the traverse make it clear that the  
16 claim as presently drafted, that defendant was not advised of the  
17 effect of a prior conviction enhancement under § 851, was not  
18 contained in the earlier pleadings. Moreover, to the extent  
19 defendant believes he was not advised of his right to plead  
20 "straight up" without an agreement, the court's prior order  
21 unequivocally addressed that issue and belies any contention to  
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23 <sup>1</sup> Although Gonzalez was decided in the context of a federal challenge to a **state**  
24 conviction and sentence under § 2254, its holding is no less applicable to habeas petitions which  
25 challenge **federal** convictions under § 2255. See e.g., Yuzary v. United States, 2007 WL  
26 4276864 (S.D.N.Y. filed Nov. 30, 2007); United States v. Bell, 159 Fed. Appx. 48 (10<sup>th</sup> Cir.  
2005); United States v. Scott, 414 F.3d 815 (7<sup>th</sup> Cir. 2005).

1 the contrary.

2 Alternatively, if defendant's motion could somehow be  
3 construed as an attack on the habeas proceedings themselves as  
4 being fatally flawed, it would fail nonetheless. Other than  
5 disagree with the court's decision, and state, without any  
6 evidentiary support that he was denied due process, defendant has  
7 not demonstrated that the judgment is void (60)(b)(4), or that  
8 extraordinary circumstances (60)(b)(6), warrant relief.

9 CONCLUSION

10 Based on the foregoing, defendant's 60(b) motion for relief  
11 from judgment is DENIED.

12 IT IS SO ORDERED.

13 Dated: June 23, 2010

14 /s/ Eward J. Garcia  
15 U. S. DISTRICT JUDGE  
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